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REDACTED—FOR PUBLIC INSPECTION

May 31, 2019

Marlene H. Dortch
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

RE: Ex Parte Notice. Applications of T-Mobile, US, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations. WT Docket No. 18-197.

Dear Ms. Dortch:

The Communications Workers of America ("CWA") submits this written *ex parte* letter in response to the May 20, 2019 letter from T-Mobile and Sprint ("Applicants") that describes the Applicants' proposed commitments related to their proposed merger ("Commitment Letter").[1]

The Commitment Letter fails to address the significant competitive harm, spectrum consolidation, and loss of 30,000 jobs that would result from the transaction. Further, the Applicants' unverifiable rural deployment commitments would leave as many as 39.2 million rural households without access to the "New T-Mobile's" high-speed 5G network. Moreover, the so-called "voluntary contributions" the Applicants proffer for failure to meet deployment commitments are toothless; not only are they tax-deductible as "voluntary contributions" to the U.S. Treasury, they represent an infinitesimal portion of the $74 billion 2018 pro forma revenue of the combined T-Mobile/Sprint.

[1] Letter from Regina M. Keeney and Richard Metzger, Counsel to Sprint Corporation, and Nancy J. Victory and Michael Senkowski, Counsel to T-Mobile US Inc. to Ms. Marlene H. Dortch, Secretary, WT Docket No. 18-197 (May 20, 2019) ("Commitment Letter").

The Applicants' Voluntary Commitments Do Not Resolve the Competitive Harm that Would Result from the Merger

The evidence before the Commission shows that the proposed transaction would lead to a substantial lessening of competition in at least two relevant antitrust markets: the overall mobile telephony/broadband services market and the narrower prepaid wireless retail services market.[2] Applicants have offered two commitments that arguably touch on the competitive harm in these markets: a commitment relating to future pricing and a commitment to divest a prepaid brand but not the underlying network.

Restoring competition is the "key to the whole question of an antitrust remedy."[3] Indeed, the operative Department of Justice policy guidance for merger remedies states that "restoring competition is the *only* appropriate goal with respect to crafting merger remedies."[4] Applicants' commitments fail to restore lost competition, and fail dramatically.[5]

1. Pricing commitment

On February 4, 2019, T-Mobile offered a pricing commitment conditioned on merger approval.[6] Subject to certain exceptions, the commitment took the form of a pledge to make available the same or better rate plans as those offered by T-Mobile or Sprint as of February 4, 2019 for three years following the merger. Applicants have now "reconfirmed" that pledge.[7]

Freezing (or capping) rate plans for three years arguably is intended to address the predictable consequences of a merger between two particularly close competitors in a highly concentrated industry – namely that the resulting loss of competition would result in substantial price increases. The economic evidence before the Commission predicts that such price increases would occur.[8]

The three year price freeze commitment is a purely behavioral remedy. No divestiture is involved in any form. From an antitrust standpoint, purely behavioral remedies have multiple

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[2] CWA Comments, WT Docket No. 18-197 (Aug. 27, 2018) at 7-9; CWA Reply Comments, WT Docket No.18-197 (Oct. 31, 2018) at 14-16.
[3] United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).
[4] U.S. Dep't of Justice, Antitrust Division, Policy Guide to Merger Remedies (Oct. 2004) at 4 (emphasis added), available at https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf.
[5] Applicants' other commitments appear to reflect different aims than restoring competition lost from the merger. For example, while "winning the race to 5G" may be a laudable objective, such a policy objective is not an appropriate consideration in the context of competition analysis. Moreover, a merger that violates the Clayton Act is not in the public interest and should not be permitted on the grounds that it may serve some other policy goal.
[6] Letter from Nancy Victory to Marlene Dortch, WT Docket No. 18-197 (Feb. 4, 2019).
[7] Commitment Letter at 6.
[8] *See* Declaration of Joseph Harrington and The Brattle Group (Exhibit B to DISH Petition to Deny) (Aug. 27, 2018), Reply Declaration of Joseph Harrington and The Brattle Group (Exhibit 1 to DISH Reply) (Oct. 31, 2018).

problems and are uniformly rejected in horizontal mergers. As the Department of Justice has stated many times, behavioral remedies are "exceedingly difficult to craft, entail a high degree of risk of unintended consequences, entangle the government and the Court in market operations, and raise practical problems such as the need for ongoing monitoring and enforcement."[9] Economists John Kwoka and Diana Moss further point out that behavioral remedies also work against the merged firm's incentives to maximize profits:

> The common feature of behavioral remedies is that they are in effect attempts to require a merged firm to operate in a manner inconsistent with its own profit-maximizing incentives. But allowing the merger and then requiring the merged firm to ignore the incentives inherent in its integrated structure is both paradoxical and likely difficult to achieve. Furthermore, the behavior that such remedies seek to prohibit or require is often difficult to fully specify, leading to subsequent enforcement issues.[10]

Pricing commitments are particularly undesirable. Price caps restrict the firm from competing on the basis of price, which is a central dimension of competition. Price caps may have the unintended consequence of discouraging the merged firm from lowering its prices. This is of particular concern in an industry in which prices have been declining and with parties that have positioned themselves as low price competitors. At the same time, price caps create incentives to reduce quality. As DOJ has commented "a requirement that the merged firm not raise price may lead it profitably, and inefficiently, to reduce its costs by cutting back on quality — thereby effecting an anticompetitive increase in the 'quality adjusted' price."[11] Finally, in this case, the price commitment contains several loopholes that are likely to make monitoring and enforcement extremely difficult.[12]

2. Boost divestiture

Applicants have offered to divest the Boost prepaid brand.[13] Divesting the Boost brand appears to be an effort to address the concern that the proposed transaction's impact would fall disproportionately on lower-income customers who purchase prepaid services.

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[9] *See, e.g.*, Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. US Airways Group, Inc., Case No. 1:13-cv-01236-CKK (D.D.C. March 10, 2014) at 30 n.52, available at http://www.justice.gov/atr/cases/f304200/304233.pdf.

[10] John E. Kwoka, Jr. and Diana L. Moss, "Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement," at 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959588.

[11] U.S. Dep't of Justice, Antitrust Division, Policy Guide to Merger Remedies (Oct. 2004) at 25.

[12] Legacy plans may be "discontinued" if "better" plans are offered; legacy plans may be "adjusted" to pass through cost increases; legacy plans may be "adjusted to modify or discontinue" third party partner benefits; device/handset offerings "are not included in this pricing commitment." *See* February 4, 2019 letter from Nancy Victory.

[13] Commitment Letter at 5-6 and Attachment 2.

However, the "divestiture" of the Boost brand is at best a partial remedy. It would not create a new facilities-based competitor and therefore would not replace Sprint as a market participant.[14] It does not involve the sale of an ongoing business that would operate independently from the merged firm. Rather, Applicants propose to sell selected assets and transfer customers. The divestiture buyer in all likelihood would remain dependent on the New T-Mobile for network access under a long term contract. In addition, New T-Mobile would retain approval rights over subsequent changes in ownership.

The Federal Trade Commission has concluded in its merger retrospectives that limited asset sales, of the type proposed by the Applicants, are at increased risk of failure.[15]

Additionally, ongoing entanglements between a divestiture buyer and seller create a significant risk that the buyer would pull its competitive punches or that the seller would use its leverage to disadvantage the buyer. The Applicants themselves have identified a few of these levers. In the commitment letter, Applicants have stated that the agreement with a divestiture buyer would include promises not to engage in "unwanted discriminatory throttling, de-prioritization, or limitations on access to new network technology."[16] Thus, even as they propose what appears to be a divestiture, the "divestiture" contemplates an ongoing relationship subject to behavioral conditions as well as approval rights.

Finally, in early 2018, senior Sprint management did an analysis of a potential transaction involving Boost.[17] The analysis was done before the Applicants entered into the proposed transaction. The analysis raises serious questions about Boost's value and competitive significance as a divestiture in this case.

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[14] The Commission excludes MVNOs from its evaluation of market concentration in the mobile telephony/broadband services market. *See Twentieth Wireless Report* (Sept. 26, 2017) at 21 n.99 ("Following widespread industry practices, the Commission generally attributes the subscribers of MVNOs to their host facilities-based service providers, including when it calculates market concentration metrics."). *See also AT&T-Leap Order,* WT Docket No. 13-193 (March 13, 2014) at ¶ 37 ("As in previous transactions, we will exclude MVNOs and resellers from consideration when computing initial concentration measures, and thus, facilities-based service providers will only be taken into account in our calculations of market concentration.").

[15] Federal Trade Commission, The FTC's Merger Remedies 2006-2012 (January 2017) at 5 ("the more limited scope of the asset package increases the risk that a remedy will not succeed"), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-economics/p143100_ftc_merger_remedies_2006-2012.pdf; Federal Trade Commission, A Study of the Commission's Divestiture Process (1999) at 12 ("divestiture of an on-going business is more likely to result in a viable operation than divestiture of a more narrowly defined package of assets"), https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf.

[16] *See* Commitment Letter, Attachment 2 at 2.

[17] *See* SPR-FCC-11655063 through SPR-FCC-11655069.

In a keynote speech before the American Bar Association's Section of Antitrust Law, Assistant Attorney General Makan Delrahim discussed the interplay between antitrust and regulation. AAG Delrahim stated:

> [A]ntitrust is law enforcement, it's not regulation. At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention. That is to say, proper and timely antitrust enforcement helps competition police markets instead of bureaucrats in Washington, D.C. doing it. Vigorous antitrust enforcement plays an important role in building a less regulated economy in which innovation and business can thrive, and ultimately the American consumer can benefit.[18]

In the same speech, AAG Delrahim expressed his deep skepticism toward behavioral remedies:

> Like any regulatory scheme, behavioral remedies require centralized decisions instead of a free market process. They also set static rules devoid of the dynamic realities of the market. With limited information, how can antitrust lawyers hope to write rules that distort competitive incentives just enough to undo the damage done by a merger, for years to come? I don't think I'm smart enough to do that.
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> Behavioral remedies often require companies to make daily decisions contrary to their profit-maximizing incentives, and they demand ongoing monitoring and enforcement to do that effectively. It is the wolf of regulation dressed in the sheep's clothing of a behavioral decree. And like most regulation, it can be overly intrusive and unduly burdensome for both businesses and government.[19]

Applicants' Commitment Letter offers just such a regulatory solution to competitive problems. Long experience tells us that this manner of resolving competitive problems is almost certain to fail.

The Rural Commitments are Not Verifiable, Not Merger-Related, and Would Leave 39.2 Million Rural Residents without Access to T-Mobile's High-Speed 5G Network in 2025

1. Deployment Commitments

Applicants' original Public Interest Statement ("PIS") showed that even under the best-case scenario, much of rural America would be left without the higher capacity mid-band coverage after the proposed merger. Table 9 in the PIS projected that if the merger were

[18] U.S. Dep't of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.
[19] *Id.*

approved, 84.6 million Americans (26 percent of the population) would still lack New T-Mobile mid-band coverage three years after the merger and 45.9 million Americans (14 percent of the population) would continue to lack access to mid-band coverage six years after the merger. The vast majority of this uncovered population would be among the 62 million Americans living in the less dense, rural areas.[20]

Now, eleven months after the Applicants filed the PIS, they make new deployment commitments, claiming that the New T-Mobile will provide mid-band coverage to 6.5 million more rural Americans three years after the merger and an additional 6.1 million rural Americans six years after the merger than originally projected in the PIS.[21] The Applicants' new commitments are not verifiable. The Applicants provide no explanation for the revised numbers, they offer no updated coverage maps, and they do not provide an updated version of the engineering model. The Applicants simply ask the Commission to accept the revision on faith. The Commission should require an updated version of the Applicants' PIS Specification 21f to verify the new commitments and to understand which parts of the country will get the additional deployment.

Even if the Commission were to accept the unverifiable new 5G deployment numbers, the best-case scenario would still leave much of rural America without the higher capacity mid-band coverage. As detailed in Attachment 1 to the Commitment Letter, 25 percent of the population – 81.7 million Americans – would not have mid-band coverage three years after the merger and 12 percent of the population – 39.2 million Americans – would not have mid-band coverage six years after the merger.[22]

Moreover, the Applicants cannot claim the low-band 5G coverage as a merger-related benefit. Table 9 in the Applicants' PIS shows that low-band coverage would be relatively constant regardless of whether the merger takes place. Without the merger, Table 9 indicates that stand-alone T-Mobile's low-band network will cover 317.9 million users three years after the merger and 323 million users six years after the merger, compared with New T-Mobile's 319.6 million users covered by 2021 and 324.1 million by 2024. Thus, the New T-Mobile's low-

[20] *See* CWA Comments, WT Docket No. 18-197 at 48-49. The CWA analysis is based on Table 9 page 47 in the Applicants' Public Interest Statement (June 18, 2018).
[21] Commitment Letter at 4.
[22] Commitment Letter, Attachment 1 at 1. Section I(A)(2) and Section I(B)(2) state that "within three years of the closing date of the T-Mobile/Sprint merger, New T-Mobile will deploy a 5G network with … a Mid-band 5G Coverage Area covering at least 75% of the U.S. Population" (leaving 25% uncovered) and "within six years of the closing date of the T-Mobile/Sprit merger, New T-Mobile will deploy a 5G network with…a Mid-band 5g Coverage Area covering at least 88 percent of the U.S. Population" (leaving 12 percent without coverage). CWA calculation of population without mid-band coverage is based on U.S. population of 327 million (U.S. Census Bureau, 2018).

band network would only service an additional 1.7 million users three years after the merger and an additional 1.1 million users by 2024 compared to stand-alone T-Mobile.[23]

2. Speed commitments

The Applicants' speed predictions are overly optimistic. The Applicants promise to deliver 50 Mbps or higher to at least 90 percent of the rural population by year six, but would deliver mid-band to only 33.3 percent of that rural population[24] – so even taking the spectrum commitment at face value without revised maps or engineering models, 33.3 percent of the rural population would only be served by low-band spectrum. For those Americans, 50 Mbps would be highly optimistic, because the peak speed in areas with only low-band service which, as stated in the commitment letter is 81.7 million Americans in year three and 39.2 million Americans in year 6, is only [redacted] Mbps.[25] With any reasonable amount of network loading, or signal levels less than optimal (as would be the case indoors or in an area with terrain or foliage), it is very difficult for any system to consistently deliver [redacted] of peak performance – and therefore it would be extremely surprising if 50 Mbps service were more than aspirational for the many T-Mobile users in those low-band served areas, which again are mostly rural areas.

As a result of the limited speeds in the low-band areas, Applicants' claims of a change in the broadband equation in those areas – with "high resolution video and audio to distant physicians enabling rural residents to access higher quality medical care and to get it faster and without having to travel hundreds of miles,"[26] – should be closely scrutinized given the difficulty of providing constant bit rate high-definition video services. The Applicants' claims should not be accepted without careful comparison to service maps and a credible engineering model.

3. Drive Test Verification

The Applicants propose to verify the speed benchmarks within nine months of the third and sixth annual anniversaries of merger closing through drive tests.[27] As an initial matter, nine months after the third and sixth annual anniversary misses the promised benchmarks by nine

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[23] CWA Comments at 49-50. The CWA analysis is based on Table 9 page 47 in the Applicants' Public Interest Statement (June 18, 2018).
[24] Commitment Letter Attachment 1 at II(B)5 & 6.
[25] The peak speed of [redacted] Mbps was derived using the equation from the PIS Declaration of Neville Ray, at 13. (Number of Cell Sites x Spectrum (MHz) Deployed Per Site x Spectral Efficiency = Capacity). For a single cell site, spectrum in low band is up to [redacted] MHz (PIS Declaration of Ray, Table 2) and in an FDD LTE system half, or [redacted] MHz is available for communications in each direction. Spectral efficiency is 2.5 in 5G in low band (PIS Declaration of Ray, Table 3). Therefore Capacity = [redacted] MHz x 2.5 bps/Hz = [redacted] MHz.
[26] Public Interest Statement at 57.
[27] Commitment Letter Attachment 1 at 3.

months. Second and more significant, the Applicants do not describe the drive test methodology they propose to use, nor do they commit to independent third-party verification. It is critical to have appropriate testing criteria. To truly verify the speeds obtained by actual consumers, the tests must take place in the actual conditions where the service would be used and with the same devices. Since actual conditions may include indoors, outdoors, and obstructed areas, the tests should occur at the cell edge and indoors. The commitment letter is silent on all of these.

The Commission should take little comfort from the testing methodology found in the Applicants' settlement agreement with the California Emerging Technology Fund ("CETF"). That agreement provides that testing should be a "reasonable outdoor use case . . . without unusual blockage and an appropriate distance between cell towers at cell site edge."[28] As a result, the tests would likely provide speeds for optimal conditions, not "real life" conditions. It strains credulity to imagine that the New T-Mobile could perform accurate, verifiable tests to confirm that New T-Mobile customers in urban, suburban, and rural areas across the 50 states are receiving New T-Mobile service at the promised speed benchmarks under actual conditions.

4. In-Home Broadband

The Applicants claim that the New T-Mobile's In-Home Broadband offering will "break the mold" for in-home broadband.[29] If so, the mold must be a very small and leaky one. The Applicants attempt to confuse the Commission with reference to the number of "eligible" and "supported" households. The relevant number here is the number of "supported" households, those households that would actually have access to the limited bandwidth reserved for the in-home broadband offering.[30] Even with the very small increase of 300,000 to 400,000 supported rural households claimed in the Commitment Letter, the Applicants' in-home broadband would only be available to [redacted] to [redacted] million households six years after closing, representing only [redacted] percent of the approximately 122.8 million U.S. households, a tiny fraction of all U.S. households. Even in 2024, according to the Applicants' rose-colored calculations, almost [redacted]% of the households passed will be in areas where there are already two or more competing broadband services. Regarding rural areas, only [redacted] to [redacted] million rural households would be

[28] Before the Public Utilities Commission of California, Sprint/T-Mobile Opening Brief, Joint Application of Sprint Communications Company L.P. (U-5112) and T-Mobile USA, Inc., a Delaware Corporation, For Approval of Transfer of Control of Sprint Communications Company L.P. Pursuant to California Public Utilities Code Section 854(a), Application No. 18-07-011 (April 26, 2019) Appendix 1 at 11-12.
[29] Commitment Letter at 4-5.
[30] T-Mobile March 6, 2019 Ex Parte, Declaration of Mark McDiarmid at 4 (explaining the company's desire "not to have a material adverse impact on the mobile network experience by reducing either throughput or user experience quality for mobile subscribers more broadly," T-Mobile is only going to take a slice out of its mobile network capacity to operate the in-home broadband network.).

supported with its in-home broadband, representing [redacted] to [redacted] percent of the approximately 23.7 million U.S. rural households. This would leave the overwhelming majority of rural households unserved by the in-home broadband service.[31]

Moreover, as CWA has already explained, the Applicants' in-home broadband offering will not be available to users who are far from antenna sites, are obstructed by terrain or foliage (because the in-home offering will not have its own antenna), and will not be available to most rural Americans (because it appears to require mid-band service).[32]

The "Voluntary Contributions" are Toothless as Enforcement Mechanisms

The Applicants are free to promise the moon and the stars because the "voluntary commitments" they proffer for failure to meet promised deployment, speed, and price milestones are as nebulous as the Milky Way.

First, "voluntary contributions" are just that – they are voluntary. They are not automatic penalties, but rather subject to the discretion of the Applicants.

Second and more egregious, voluntary contributions to the U.S. Treasury are tax-deductible, thereby significantly reducing any financial consequence to the New T-Mobile for non-compliance.

Third, the Applicants themselves are responsible for data reporting, putting the fox in charge of the hen house. There is no provision for independent audit of the Applicants' self-reported data.

Fourth, the Applicants have access to a broad "get out of jail free" card to avoid any financial consequence for failure to meet promised benchmarks. The commitment letter allows the Bureau to "reduce the metric, extend the deadline or reduce the contribution amount" for circumstances beyond the company's control, including "law or order of any government body" or "significant interruptions in the supply chain."[33] If the New T-Mobile faces "supply chain interruptions" as a result of a U.S. ban on Huawei components driving up prices or creating equipment shortages, or if Congress or the Commission makes legislative or regulatory changes impacting the wireless industry, then the Bureau (not the full Commission) can change deployment metrics, deadlines, or contribution amounts. This is a loophole so big that the New T-Mobile can drive a truck through it.

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[31] Commitment Letter at 4-5; *See* CWA Comments on Applicants' Revised Network Combination Plan and Economic Analysis and "New T-Mobile In-Home Internet," WT Docket No. 18-197 (March 28, 2019) at 9-12.
[32] CWA March 28, 2019 Comments at 12.
[33] Commitment Letter Attachment 1 Section V(D) at 5.

Fifth, the "voluntary contribution" rates are so small that they cannot serve as an effective deterrent.[34] To take just one example, the Applicants commit to deploy within three years (plus nine months) broadband at 50 Mbps speed to 66.7 percent of the rural population – or 40 million people.[35] If the New T-Mobile only reaches 50 percent of the rural population, or 30 million people, it will have missed the milestone by 16.7 percentage points (66.7 minus 50). According to the "voluntary contribution" table in the commitment letter, each one percent shortfall for failure to meet the rural milestone counts as only 0.5 percent.[36] Therefore, the missed percentage is divided in half and becomes 8.35 (16.7 divided by 2). The contribution scale in the Commitment Letter calls for a "voluntary contribution" of $25 million for a missed percentage of 8.35. The "voluntary contribution" for missing a rural broadband deployment commitment by 10 million people represents only 0.34 percent of the combined companies' 2018 pro forma revenue of $74 billion.

The Commitment Letter is Silent on Jobs

The impact of a proposed merger on employment is part of the Commission's public interest analysis.[37] CWA has provided the Commission with a detailed analysis that demonstrates the proposed merger would result in the loss of 30,000 jobs due to the elimination of overlapping stores and headquarters functions.[38] CWA has also provided the Commission with an economic study of the labor market impact that would result from the consolidation of the wireless industry from four to three national carriers, resulting in the decline of retail wireless workers' annual earnings of up to $3,276 (the labor monopsony effect).[39] The proposed Boost divestiture into an MVNO does nothing to alleviate concerns about merger-related job loss at retail stores. MVNOs such as Tracfone tend to operate significantly fewer standalone retail locations than facilities-based prepaid carriers. For example, while America Movil/Tracfone has more subscribers than either Metro or Boost, it only operates 258 standalone retail locations nationally as compared to 5,673 for Boost and 9,503 for Metro.[40]

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[34] The proposed voluntary contributions are very confusing. It is not clear how a "missed percentage" is calculated. It is not clear whether this means a missed percentage of population covered, a missed percentage of promised speeds, or something else.
[35] Commitment Letter Attachment 1 Section II(A)5.
[36] *Id.* Section V(A)3.
[37] CWA Comments at 3-4.
[38] CWA Comments at 54-71; CWA Reply Comments at 2-12.
[39] Letter from Debbie Goldman, CWA Telecommunications Policy and Research Director, to Marlene Dortch (March 1, 2019) with attached report, *Labor market impact of the proposed Sprint-T-Mobile merger.*
[40] CWA calculation derived from company websites.

Yet, the Applicants' letter makes no commitment whatsoever to ensure that the transaction preserves U.S. employment and protects jobs and compensation levels for current employees of T-Mobile, Sprint and their authorized dealers. Further, the Applicants make no commitment to return overseas customer call centers to the U.S., or to cease their anti-union behavior by committing to complete neutrality in allowing their employees to form a union of their own choosing, free from any interference by the employer.[41]

The Commitment Letter is Silent on Spectrum Divestiture

The Commission has long recognized that spectrum is a key input for wireless service and that "the state of control over the spectrum input is a relevant factor in its competitive analysis."[42] The proposed merger would massively exceed the Commission's spectrum screen of 238.5 MHz. The spectrum holdings of the New T-Mobile – almost 300 MHz on an average basis – would vastly exceed the Commission's spectrum screen and the holdings of other wireless carriers. The New T-Mobile would hold nearly three times as much spectrum per subscriber as Verizon and more than twice as much spectrum per subscriber as AT&T. The New T-Mobile would exceed the Commission spectrum screen in each of the top 100 counties in the United States, based on population, and in almost two-thirds (63.9 percent) of all counties in the United States. On a national basis, 92 percent of the U.S. population, ore more than 284 million people, live in counties in which the New T-Mobile would exceed the spectrum screen.[43] Yet, the Applicants fail to make any spectrum divestiture commitments.

[41] CWA Comments at 75-76.
[42] Policies Regarding Mobile Spectrum Holdings Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, Report and Order, 29 FCC Rcd 6133, 6143 ¶ 17 (2014).
[43] CWA Comments at 21-23.

Conclusion

The Commission evaluates proposed mergers on a sliding scale: "as the harms to competition become greater and more certain, the degree and certainty of the public benefits must also increase commensurately."[44] In the instant transaction, the harms to competition are substantial and solid, yet the Applicants' commitments are simply a wish list of shaky, unverifiable promises. The Commission should not approve the proposed transaction.

Respectfully submitted,

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[44] AT&T/Teleport Order 13 F.C.C. Rcd. 15236 n.150 (1998) quoting NYNEX/Bell Atlantic Order, 12 F.C.C. Rcd. 20063 ¶ 157 (1997).